

**BEFORE THE
COMMITTEE ON COMMERCE, SCIENCE AND
TRANSPORTATION
UNITED STATES SENATE**

**TESTIMONY OF THE HONORABLE STAN WISE
COMMISSIONER, GEORGIA PUBLIC SERVICE COMMISSION
&
PRESIDENT, NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS (“NARUC”)**

ON

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Mr. Chairman, Ranking Member Hollings and members of the Committee, I am Stan Wise, Commissioner with the Georgia Public Service Commission and President of the National Association of Regulatory Utility Commissioners (NARUC). Founded in 1889, NARUC represents the interests and consensus policy positions of State public utility commissions in each of your states.

We are pleased to offer our testimony today on Senator Sununu's "VOIP Regulatory Freedom Act" and the broader changing landscape of telecom business, technology and law. Now is an exciting time for the telecom industry because so many innovative new technologies are entering the market to enrich the lives of consumers and the productivity of businesses.

Our challenge as state and federal policymakers is to allow this vibrant industry to take its course with as much flexibility as possible while still preserving the consumer protections, ubiquity and reliability that the public values and expects in its telecom system.

Rural America and VOIP reform as telecom reform:

One need only open a newspaper these days to see that VOIP is the domain, not just of ambitious start-ups like Vonage and Pulver, but of all the leviathans of the communications industry, including the Bell companies, the long-distance carriers, the major cable operators and even the promising wi-fi and broadband over power lines companies.

As we keep our eyes on the future, we must contend with urgent challenges to the sustainability of reliable, affordable phone service in the rural and high cost markets around the country. Creeping regulatory arbitrage is eating away at the foundations of Universal Service and the intercarrier compensation system. Without these, consumers in rural and high cost areas would have to choose between exorbitant rates for basic service or simply being cut off from the outside world.

Today, the VOIP services that are attracting most attention are actually hybrid services that bundle packet-switched calls with the services of traditional competitive and long-distance phone companies, terminating well over 90 percent of their calls to the Public-Switched Telephone Network (PSTN). These services could never get off the ground without the ubiquitous PSTN that ratepayers have paid to build out to every corner of America over the decades. Explicitly exempting all VOIP, including those forms of VOIP that use the PSTN, from regulation under this system could prove to be a naïve step in the direction of never reforming it.

Thus when we consider a new federal statute to address VOIP technology, we are talking about the heart of a potential new Telecommunications Act. The decisions we make about its participation in the telecom system and the public interest obligations it must live up to are really decisions about what we as a society will expect from the telephone system of the future.

The NARUC approach: functional nature of the service.

In assessing the impact and import of new communications technologies, a consensus of NARUC commissioners have come to the conclusion that writing broad new policies around specific technologies will always leave us one step behind and may even hurt the development of technology by sending distorted signals to the marketplace.

Instead, NARUC's resolutions on VOIP emphasize that regulatory treatment should follow from the functional nature of a service, not the way it works under the hood. Rather than looking to the technology itself, policymakers should look at the salient features of a service. In most cases, the starting point in our analysis should be what it is to the consumer.

The "functional nature" approach does not mean regulating new VOIP services just as if they were traditional circuit-switched service from Ma Bell. Rather it means a rigorous, intellectually honest dialogue about which public interest obligations are attached to which features of a particular service. If the physical structure of a particular service makes its carrier unable to exert market power, for example, that may impact whether the full panoply of economic regulations should apply.

The New York Public Service Commission took that approach to heart in its recent decision regarding Vonage Holdings Corp. It examined a specific service offered to New York consumers and found it to be a telecom service. Based on the salient traits of that service, the NY PSC found traditional economic regulations inapplicable, but it did rule that consumers should receive reliable 911 emergency dialing services.

The service was marketed as a replacement for traditional phone service but the lengthy standard contract that consumers had to sign contained some alarming provisions. Specifically, the company's Terms of Service agreement, on page 7 of a 15 page single-spaced document¹ said:

"You acknowledge and understand that 911 dialing from your Vonage equipment will be routed to the general telephone number for the local emergency service provider (***which may not be answered outside business hours***)**, and will not be routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls at such local provider's facilities when such calls are routed using traditional 911 dialing." **(emphasis added)

¹ The Terms of Service agreement is contained in a small window that consumers may scroll through when signing up for Vonage service online. If copied and pasted into a Word document, it takes up 15 single-spaced pages. The document quoted above was last updated on April 27, 2004.

Imagine if a consumer in upstate New York who replaced his traditional phone line with this service had the rotten luck of experiencing a heart attack or stroke after “normal business hours.” He dials 911 and, because it only goes to the business line, no one picks up. Brutal as it sounds, he is simply out of luck!!

The New York PSC’s order suggested this was unacceptable but actually invited the company to work with them on an acceptable framework for achieving these important goals and to apply for waivers where traditional phone regulations did not apply.

Consumer protection and VOIP:

Even in a fully “packet switched” world, consumers will have a range of legitimate expectations about their service. The telecom business continues to be one where an ongoing consumer relationship is formed through an extensive small-print form contract that goes largely unread until there is a problem with the service. Often the contract locks the consumer in to a year or more of service with stiff financial penalties for breaking the contract.

State Commissions handle tens of thousands of individual consumer complaints every year, covering such issues as

- Slamming and cramming;
- Clarity and honesty in billing;
- Intrusive or deceptive marketing,
- Quick response to service outages,
- Privacy of customer billing and calling records; and
- Making sure the emergency dialing service lives up to the trust that consumers put in it.

These obligations generally apply to whichever company maintains the direct consumer relationship. Most complaints are resolved through Commission mediation or just explanation, although some merit intervention and enforcement.

State commissions are particularly well-suited to this watch dog and referee role because they are in the local communities, staffed to be responsive and have unique expertise in the telecom business. Depriving State commissions of this role would fragment the response effort and confuse consumers as they were shuffled from one agency to another based on the technology they were using. Distant federal agencies would be hard-pressed to handle the load.

Interconnection and competition:

Cable industry representatives recently commented that State commissions will likely have a critical role to play in arbitration of interconnection agreements as the facilities-based VOIP carriers seek to knit themselves into the larger phone network. NARUC members have fulfilled this role for years already and are prepared to safeguard the same rules of nondiscrimination and fair dealing for the VOIP industry as they have for CLECs and others.

Senator Sununu's bill raises a related issue – also highlighted recently by FCC Chairman Michael Powell – of whether the “independent” VOIP carriers with no local facilities of their own will be able to survive if the facilities owners choose to favor their own VOIP products in the long run with preferential treatment. Vonage CEO Jeffrey Citron recently commented to the Washington Post that this might be an area that merits government intervention.

Also, following “salient features” test, it is important to clarify that simple use of packet switching should not absolve a company of all its competitive obligations. While a company like Pulver, Packet8 or Vonage may not be positioned to exert market power when it acts independently, it is entirely foreseeable that a traditional incumbent could migrate customers to VOIP service en masse and still position itself to exert market power, especially in regions where it was the exclusive facilities-based broadband provider. S. 2281 would allow this exertion of market power to occur unabated.

Senator Sununu's bill:

With regard to S. 2281, the question of the hour is whether Congress can or should break off a piece of the larger Telecom Act debate and pass it as a separate item in the remaining months of the 108th Congress, and if so, whether this is the right approach. Unfortunately, while NARUC appreciates and respects the dialogue that this legislation has spurred, we believe the answer to that question is a resounding “no.”

S. 2281 does insufficient justice to the related issues of inter-carrier compensation and universal service, both of which are inextricably linked to VOIP. By seeking only to extricate a new specific technology from all forms of regulation under the systems that support the universal availability of the telecom network, this bill has the feel seeking to abandon a sinking ship – even though most VOIP services depend on a healthy PSTN.

Also, by dismissing a state role out of hand on such core issues as consumer protection, interconnection, emergency dialing, market power and state universal service programs it would deal consumers and competitors a poor hand at the outset of a new era in telecommunications.

Ultimately, S. 2281 suffers from a technology-specific approach that is driven, in large part, by the haste with which the issue has been pursued thus far. With more time, state and federal policymakers could cooperate in parsing out functionalities and features that deserve more precise regulatory treatment and, in some cases, strategic forbearance. At the same time we could shore up the foundations of universal service and rational inter-carrier compensation to make sure our rush toward the future doesn't leave some communities stuck in the distant past.

NARUC looks forward to that dialogue and we plan to engage constructively in it, but we cannot support the specific approach embodied in S. 2281.